

EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

NORTH COUNTY COMMUNICATIONS
CORPORATION, a California corporation,

Plaintiff,

v.

VAYA TELECOM, INC., a California corporation,
and DOES 1-100, inclusive,

Defendants.

CASE NO.: 37-2011-00083845-CU-BC-CTL

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT VAYA TELECOM, INC.'S
DEMURRER TO PLAINTIFF NORTH
COUNTY COMMUNICATIONS
CORPORATION'S COMPLAINT

DATE: July 8, 2011

TIME: 10:00 a.m.

DEPT: C-60

JUDGE: Hon. Lisa Foster

DATE ACTION FILED: January 14, 2011

TRIAL DATE: Unassigned

CPUC approved tariff on file since 2008 and has billed Vaya at a rate of \$0.011 per minute. Comp., p.4 at ¶¶ 24-25.

III. ARGUMENT

A. **Vaya May Demur to NCC's Complaint on Multiple Grounds, Including Defendant's Lack of Legal Capacity to Sue, the Complaint's Failure to State Facts Sufficient to Constitute a Cause of Action, and the Complaint's Uncertainty.**

The Code of Civil Procedure § 430.10 provides:

...The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

"...(b) The person who filed the pleading does not have the legal capacity to sue." Cal. Civ. Proc. Code § 430.10(b).

"...(e) The pleading does not state facts sufficient to constitute a cause of action ... " Cal. Civ. Proc. Code § 430.10(e).

"...(f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible." Cal. Civ. Proc. Code § 430.10(f).

Additionally, Code of Civil Procedure § 430.50 provides:

"...(a) A demurrer to a complaint or cross-complaint may be taken to the whole complaint or cross-complaint or to any of the causes of actions stated therein..."

B. **This Court Should Dismiss NCC's Complaint Pursuant to the Primary Jurisdiction of the CPUC Because the Commission Has Special Competence Regarding the Reasonableness of NCC's Tariff.**

Vaya concedes that this Court has proper jurisdiction to hear NCC's claim. *See e.g. Cundiff v. GTE California Inc.* (2002) 101 Cal.App.4th 1395, 1407-1408. Regardless of the existence of proper jurisdiction, this Court it should defer to the jurisdiction of the CPUC under the well-established doctrine of "primary jurisdiction." As the United States Supreme Court has previously explained, the primary jurisdiction doctrine is applicable whenever the issues before the court are "within the special competence

1 which employed credit allowance devices as a limit of their liability. Cole v. Pacific Tel. & Tel. Co.
2 (1952) 112 Cal.App.2d 416; *see also* Waters v. Pacific Tel. Co. (1974) 12 Cal.3d 1, 7-8. Plaintiff brought
3 an action to recover damages for failure to include a customer's name and advertisement in Pacific's
4 classified directory. Pacific's tariff schedule limited liability regarding advertisements and Plaintiff
5 challenged the reasonableness of the tariff schedule. In holding that the doctrine of primary jurisdiction
6 applied to grant the CPUC jurisdiction, the court concluded, "...although a particular limitation provision
7 may be challenged as unreasonable, the question of reasonableness should first be directed to the
8 commission, not the trial courts." *Id.* at 419.

9 Similarly, the Court of Appeals has held that claims involving ratemaking, the reasonableness of
10 rates and/or tariffs, or the uniform application of the CPUC's rates or regulatory statutes, directly
11 implicates primary jurisdiction of the CPUC. Wise v. Pacific Gas & Electric Co. (1999) 77 Cal.App.4th
12 287, 292-93. *Wise* noted that the CPUC may exercise equitable jurisdiction incident to its express duties
13 and authorities, such as for example, creating a trust fund for potential refunds during a stay of an order
14 lowering rates, reforming rate contracts of public utilities to make them conform to the public interest,
15 and issuing cease and desist orders for unreasonable rates. *Id.* at 299. Furthermore, *Wise* touches on the
16 necessity of granting a proper stay in order for a party to seek the expertise of the administrative body
17 when it notes that the primary jurisdiction doctrine requires the court to refer the issue to the agency:

18 "[The doctrine of primary jurisdiction] requires the court to enable a
19 'referral' to the agency, staying further proceedings so as to give the
20 parties reasonable opportunity to seek an administrative ruling. Referral
21 of the issue to the administrative agency does not deprive the court of
22 jurisdiction, [the court] has discretion either to retain jurisdiction, or, if
23 the parties would not be unfairly disadvantage, to dismiss the case
24 without prejudice." *Id.* at 232.

25 Pursuant to Cal. Pub. Util. Code Section 2106, NCC has prayed for damages based upon traffic
originated by Vaya and terminated by NCC at the tariff rate of \$0.011. Comp., p.4, ¶ 25. In light of what
has been previously construed by the CPUC as reasonable, however, NCC's tariff rate of \$0.011 is

1 unreasonably high and requires further examination by the Commission regarding its reasonableness. As
2 previously mentioned, Vaya acknowledges that this Court has subject matter jurisdiction over this action,
3 but notes that courts have ruled that a judicial award of money damages is not appropriate where the
4 award would "hinder or frustrate" the CPUC's supervisory and regulatory policies. See Pink Dot, Inc.
5 (2001) 89 Cal.App.4th 407, 107 Cal.Rptr.2d 392 (2001); San Diego Gas & Electric Co. (1996) 13
6 Cal.4th 893, 55 Cal.Rptr.2d 724. The unreasonableness of NCC's tariff is illustrated by the very support
7 NCC cites in its Notice of Lodgment. See Plaintiff's Notice of Lodgment Exhibit G, Pac-West v. Blue
8 Casa, CPUC Case 07-10-017, page 6 footnote 8 (finding tariff rates of \$.002 per call plus \$.001 per
9 minute under tariff Schedule Cal. CLC 1-T Section 12.12 to be applicable); Plaintiff's Notice of
10 Lodgment Exhibit H, Pac-West v. Telscape Communications, CPUC Case 07-10-018 page 6 footnote 8
11 (finding tariff rate of \$.002 per call plus \$.001 per minute under tariff Schedule Cal. CLC 1-T Section
12 12.12 to be applicable); Plaintiff's Notice of Lodgment Exhibit I, Pac-West v. Pacific Centrex Services,
13 CPUC Case 07-08-026 (granting default judgment against defendant Pacific Centrex Services under
14 section 12.12 of Pac-West's tariff Schedule Cal. CLC 1-T); Plaintiff's Notice of Lodgment Exhibit F,
15 Pac-West v. Comcast Phone of California, CPUC Case 07-09-010 page 17 (finding the applicability of
16 same tariff Schedule Cal. CLC 1-T); Plaintiff's Notice of Lodgment Exhibit E, Pac-West v. AT&T
17 Communications of California, CPUC Case 04-10-024, page 34 (finding the applicability of same tariff
18 Schedule Cal CLC 1-T). Vaya acknowledges that the traffic involved in these cases is distinguishable
19 from that which is involved in the present action. Nonetheless, the rates cited in these cases serve as a
20 helpful basis for comparison.

21 The \$0.002 per minute rate set forth in the cases upon which NCC relies is exponentially less
22 than the per minute rate of \$0.011 to which NCC alleges it is entitled. Further, carrier-to-carrier
23 interconnection agreements approved by the CPUC universally include termination rates far below those
24 found in NCC's tariff. Deferring to the jurisdiction of the CPUC serves the underlying policy of
25 promoting judicial economy by alleviating the Superior Court with the burdensome task of analyzing and

1 may in fact be valid, the absence of case law involving two non-competing CLECs strongly indicates that
2 an award of damages in this action may alter regulatory policy in California in a manner that hinders or
3 frustrates the policies of the CPUC. Vaya acknowledges and takes notice of the decisions of the CPUC
4 cited as support in Plaintiff's Notice of Lodgment. *See* Plaintiff's Notice of Lodgment Exhibits E-I.

5 Vaya emphatically disagrees, however, with NCC's characterization of these decisions. While
6 the decisions support NCC's general theory that one CLEC may collect tariffed termination rates from
7 another CLEC, the decisions all involve the exchange of traffic for internet service providers (dial-up
8 internet service) which involves traffic distinguishable from the present action. Comp. p.6-7, ¶ 44.
9 ("termination of Defendants' customers' phone calls"). As well, these decisions fully reflect the
10 complexity of regulatory policy as well as the interplay between federal and state law in technology-
11 specific contexts. *See generally* Plaintiff's Notice of Lodgment Exhibit E, Pac-West v. AT&T
12 Communications of California, CPUC Case 04-10-024 (the CPUC examines at length the decisions of the
13 FCC regarding termination rates of ISP, cellular, and interexchange traffic and discusses the propriety of
14 regulating tariffed termination rates in the absence of federal interpretation).

15 Moreover, all of the decisions cited by NCC in its Notice of Lodgment involved tariffs with
16 termination rates far below those claimed by Plaintiff. *See* Plaintiff's Notice of Lodgment Exhibit G,
17 Pac-West v. Blue Casa, CPUC Case 07-10-017, page 6 footnote 8 (finding tariff rates of \$.002 per call
18 plus \$.001 per minute under tariff Schedule Cal. CLC 1-T Section 12.12 to be applicable); Plaintiff's
19 Notice of Lodgment Exhibit H, Pac-West v. Telscape Communications, CPUC Case 07-10-018 page 6
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